United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

77-7242

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 77-7242

SIDNEY H. MILLER,

Plaintiff-Appellant,

-against-

AVIS, INC., RICHARD JOYCE SMITH, DRUMMOND C. BELL, RODNEY C. GOTT, ROBERT W. HAACK, WILLIAM W. LYON, ROBERT C. O'BRIEN, ELI SHAPIRO, OLCOTT D. SMITH, WILLIAM E. FRUHAM, JR., ALVA R. BONDA and JOHN J. SCANLON,

Defendant-Appellees.

(on appeal from the United States District Court for the District of Connecticut)

PLAINTIFF-APPELLANT'S BRIEF

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-against-

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Defendant-Appellees.

(on appeal from the United States District Court for the District of Connecticut)

PLAINTIFF-APPELLANT'S BRIEF

Preliminary Statement

This is an appeal from each and every portion of an Order of the United States District Court for the District of Connecticut (Blumenfeld, J.) of May 23, 1977 denying, inter alia, the motion of plaintiff-appellant Sidney H. Miller (hereinafter "Miller"), brought on by order to show cause dated May 20, 1977, which sought to enjoin defendant-appellee Richard Joyce Smith, as Trustee ("Trustee") (pursuant to an Order of the District Court of Connecticut dated January 6,

1975 in United States of America v. International Telephone and Telegraph Corporation, et ano, Civil Action No. 13,320, (D. Conn.) (hereinafter "United States v. ITT")) and defendant-appellee Avis, Inc. ("Avis") (i) from voting any shares of Avis common stock at the Avis shareholder meeting scheduled for May 25, 1977, and (ii) from soliciting any proxies with respect thereto; and (2) to enjoin defendant-appellee Avis from holding the shareholder meeting scheduled for May 25, 1977 until the material misrepresentations and omissions in the proxy statement for said meeting were corrected.

In addition, plaintiff-appellant Miller appeals from the refusal of the Court below to hear on the merits plaintiff's application for (1) leave to intervene in United States v. ITT; (2) an order enjoining defendant-appellee Trustee from commencing and effectuating the contemplated secondary offering and sale of two million (2,000,000) shares of Avis stock; and (3) consideration of the alleged breach of the Trustee's fiduciary duty as a basis for granting the preliminary relief sought.

The instant action is brought by a holder of 1,000 shares of Avis common stock, as a class action on behalf of the public shareholders of Avis. Briefly, Count I of the Complaint asserts violations of Section 14(a) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 14a-9 promulgated thereunder. Count I asserts that the proxy materials for the Avis shareholders meeting scheduled for May 25, 1977 contain misrepresentations of and omissions of material facts with respect

to certain proposals for which shareholder approval was sought, to wit, amendments of the by-laws and certificate of incorporation of Avis which would provide for the staggered election of its Board of Directors, would require 80% shareholder approval of certain transactions involving changes of corporate ownership or control, such as mergers and consolidations, sales of assets and the like, and would require an 80% shareholder vote to amend or repeal these minority veto or "anti-takeover" provisions.

Count II of the Complaint is a pendent claim. It alleges that the Trustee breached his fiduciary duty to the shareholders of Avis by his opposition to an advantageous offer for the Avis common stock held by him -- approximately 47% of the total outstanding -- which had the effect of irreparably harming the Avis public shareholders, by depriving them of the opportunity of receiving an equitable and advantageous offer for their shares.

Count III is brought derivatively in the right and for the benefit of Avis, alleging that Avis was damaged by virtue of the other defendants' conduct as alleged in Counts I and II.

Federal jurisdiction over this action is invoked pursuant to Section 27 of the Exchange Act and principles of pendent jurisdiction.

ISSUES PRESENTED FOR REVIEW

1. Is there a likelihood that plaintiff-appellant will be able to succeed in establishing that the proxy materials issued prior to the shareholders meeting, seeking shareholder

approval of significant changes in the subject corporation's governance, contained materially false and misleading statements and omissions of material facts, in violation Section 14 of the Exchange Act and Rule 14a-9 promulgated thereunder?

2. Does a supplemental proxy statement cure materially false and misleading statements and omissions of material fact in an original proxy statement when, due to belated dissemination, shareholders are given hardly any time to receive and digest the information contained in the supplemental proxy statement before deciding how to exercise of their franchise; especially in the absence of any evidence of its actual receipt by shareholders prior to the meeting for which it was issued?

3. Will the plaintiff-appellant and the class of shareholders he represents be irreparably harmed if the denial of the preliminary injunctions is permitted to stand?

4. Does plaintiff-appellant raise serious litigible issues on the merits and does a balancing of the hardships tip toward the granting of the injunctive relief sought?

5. Did the District Court commit error in not considering all the allegations contained in plaintiff-appellant's entire complaint when considering the motion for preliminary injunction, in not granting plaintiff-appellant's order to show cause for intervention in United States of America v. International Telephone and Telegraph Corporation et ano, Civil Action No. 13,320 (D. Conn.) and in failing to consider

the application to enjoin the Trustee from proceeding with the sale of two million shares of the subject corporation's stock held by him by means of an imminent secondary offering?

STATEMENT OF FACTS

This action, brought by plaintiff-appellant Miller, an owner of 1,000 shares of the common stock of Avis since March, 1974, arises out of an attempt by defendants-appellees to alter the procedures for the governance of Avis, so as to deter changes in the composition of its Board of Directors by establishing three classes of directors with staggered terms, and to require 80% shareholder approval (or a two-thirds board majority), for approval of proposed transactions such as mergers, consolidations and sales of assets effecting any change of control. This attempt has occurred at a time when Avis' Trustee is supposedly in the process of divesting himself of control of Avis and its directorate. (A*26; PA** 239)

On May 4, 1977, Avis issued a Notice of Annual Meeting ("Notice") and Proxy Statement ("Proxy Statement") seeking the votes of its shareholders in favor of certain proposals at an annual meeting scheduled for May 25, 1977. As of that date, approximately 47% of Avis' issued and outstanding common stock (3,743,504 shares) was held by the Trustee appointed

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* "A" refers to the appendix on appeal in this appeal.

** "PA" refers to the appendix in an appeal from an order of the District Court in a related case, Robert Prather v. Avis, Inc., et al. denying injunctive relief, which appeal is being heard herewith. See note on page 7 hereof.

by the District Court in United States v. ITT, supra, and was beneficially owned by ITT. The remaining 53% (approximately 4,150,000 shares) was owned by the public. (A 26; PA 240)

Prior to the scheduled meeting, and on or about May 16, 1977, Fuqua Industries, Inc. ("Fuqua") made an offer to the Trustee to purchase the entire 47% of the Avis common stock held by him, for cash, at $15.50 per share. In addition, Fuqua stated that, should it succeed in acquiring the Trustee's shares, it would propose to the other Avis stockholders a merger of Fuqua and Avis. Fuqua has represented to the stockholders of Avis, that the transaction which it proposed to them would involve consideration per share at least equivalent in value to the $15.50 offered to the Trustee, and that the transaction would be in a tax free form. (A 25-26) Said price of $15.50 a share is higher than the market price of Avis stock as of the close of business on May 16, 1977), which was $13.876 and substantially higher than the book value per share as of December 31, 1976, which was $13.26.

On the day the Fuqua offer was allegedly received, May 17, 1977, Avis filed a Registration Statement with the Securities and Exchange Commission ("SEC") for a proposed secondary offering of 2 million shares of common stock -- the selling shareholder to be the Trustee. (PA 48-49) If effectuated, this offering would reduce the percentage of Avis common stock held by the Trustee from 47% to approximately 23%. In addition, it would increase the public float of such stock by approximately 50%, from 4,150,000 shares to 6,150,000 shares.

The Fuqua offer was transmitted by means of a letter to the Trustee which, inter alia, informed him of Fuqua's intention to petition the District Court to authorize the Trustee to accept that offer. According to Fuqua, copies of that letter were delivered to all of the individual defendants herein -- i.e. all of the then directors of Avis. On May 18, 1977, apparently within twenty-four hours of receiving the offer, the Trustee informed Fuqua that its offer would not receive favorable consideration, and that he would not alter the course of action upon which he had already determined; including the proposed changes in the method of corporate governance and the 2 million share secondary offering. (PA 48-49)

On May 19, 1977, Fuqua had commenced a proceeding in the District Court in the form of a motion to intervene in United States v. ITT, supra, to obtain the Court's authorization for the Trustee's acceptance of its offer in accordance with the intention announced in its letter to the Trustee and the other Avis directors.*

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* Fuqua also moved to enjoin the May 25, 1977 shareholders' meeting and the Trustee from voting his shares thereat. In additon, another Avis shareholder, Robert Prather, commenced an action (in behalf of himself only) in the District Court, under Docket No. H-77-222 entitled Robert A. Prather v. Avis, Inc., et al. and, by May 19, 1977, moved for similar injunctive relief against the Trustee and the meeting. The District Court denied the motion by Fuqua and Robert Prather, and they both appealed to this Court from such denials. Those appeals are being heard together with the appeal herein. The appeal by Robert Prather is under Docket No. 77-7240 and the appendix in that appeal is referred to herein as "PA". The appeal by Fuqua is under Docket no. 77-6080 and the appendix in that appeal is referred to herein as "FA".

On the following day, May 20, 1977, the instant action was commenced by Miller; who had learned of the Fuqua offer, its apparent rejection, and the contemplated 2 million share secondary offering by the Trustee, only the day before.

Subsequently, a "Supplement to Proxy Statement", under date of May 19, 1977 ("Supplemental Proxy") was issued by Avis, purporting to advise Avis' public shareholders of "events subsequent to the mailing of the Proxy Statement" and also purporting to disclose certain information which Fuqua had charged it with omitting from that Proxy Statement.

A. The Original Proxy Materials

The Notice, which formed part of the original proxy materials mailed on or about May 4, 1977, summarized as follows the proposals for the change in the governance of Avis (hereinafter, collectively, "the Proposals"):

> "(1) To elect twelve (12) directors of the Company to hold office for terms of one to three years and until their respective successors shall have been elected and shall have qualified or, if Item (2) is not approved, until the next Annual Meeting of Stockholders and until their respective successors shall have been elected and shall have qualified;
>
> "(2) To act upon a proposal to amend the By-laws of the Company to provide for the division of the Board of Directors into three classes, the terms of which expire at successive Annual Meetings of Stockholders, to provide that directors may be removed from office only for cause and to increase the number of directors required to constitute a quorum to a majority of the entire Board, and to amend the Certificate of Incorporation of the Company to require a special stockholder vote to amend the foregoing By-law provisions;
>
> "(3) If the proposal described in Item (2) is approved, to act upon a proposal to amend the

Certificate of Incorporation of the Company to require a special director or stockholder vote for certain mergers, consolidations and similar transactions under specified circumstances and for any alteration or repeal of such provisions. " (PA 239; A 26)

The Proxy Statement accompanying the Notice elaborates upon all of the Proposals. The net effect of Proposal No. 1 and Proposal No. 2 is to create a staggered Board of Directors, such that one-third of its total membership would stand for re-election each year, commencing with the 1978 annual meeting of stockholders. Thus, at least two annual meetings would be required in order for control of the Board of Directors to change, and at least three annual meetings would be required in order to effectuate a total change in Board membership, barring resignations or other extraordinary events. (PA 248)

In addition, to further discourage turnover, Proposal No. 2 would also amend the by-laws of Avis so as to provide that directors could only be removed for cause; while the present by-laws permit stockholder action to remove directors without cause. Still further, it seeks to insure the permanence of this change by an amendment of the Certificate of Incorporation requiring the affirmative vote of 80% of the outstanding shares of all classes of stock of Avis in order to alter, amend or repeal the proposed by-law changes. (PA 248)

Proposal No.3 is summarized by the Proxy Statement as follows:

"In summary, the proposed amendment provides that, with certain exceptions, the affirmative vote of the holders of 80% of the outstanding

shares of all classes of stock of the Company entitled to vote generally in the election of directors shall be required to authorize:

(a) any merger or consolidation of the Company or any subsidiary with or into any other corporation,

(b) any merger or consolidation of the Company or any subsidiary with or into any other corporation,

(c) any sale, lease, exchange or other disposition by the Company or any subsidiary, including a distribution in partial or complete liquidation, of all or any substantial part of the assets of the Company or any subsidiary, to or with any corporation, person or other entity, or

If, in any such case, (i) the fair market value of the securities, cash or other property furnished ... exceeds $1 million and (ii) such other corporation, person or entity is, or within the preceding twelve month period has been, the beneficial owner, directly or indirectly, of 5% or more of the outstanding capital stock of the Company entitled to vote generally in the election of directors."

The Proxy Statement further sets forth that the 80% vote requirement would not apply to any of the covered classes of transactions if the board of directors of Avis had previously approved such transaction by at least a two-thirds vote of the entire board or if the transaction was with an entity then majority owned by Avis or any of its subsidiaries. (PA 249-250).

In commenting on the above discussed Proposals, the Proxy Statement said, inter alia:

"...the proposed amendments of the Company's Certificate of Incorporation and By-laws are intended, in general, to make more difficult, and therefore discourage, attempts by others to acquire control

> of the Company, through acquisitions of stock or otherwise, in transactions not approved by the Company's Board of Directors. Neither the Company nor the Trustee is aware of any pending or proposed transaction that would be affected by the proposed amendments." (emphasis supplied) (PA 295)

These proxy materials did not inform the public stockholders of Avis of the existence of the Fuqua offer. Moreover, they did not reveal to them that Fuqua had further informed the Trustee that, should the minority veto or "anti-takeover" proposals be enacted, Fuqua would withdraw its offer; nor, a fortiori, did these materials reveal the Trustee's rejection.

In addition, these proxy materials were wholly silent as to the prospective two million share secondary offering of common stock then held by the Trustee, which was filed with the SEC less than two weeks after the Proxy Statement was disseminated. It appears that, by May 4, 1977, preparation of this secondary offering was well along. Avis had informed a group of security analysts, in March, 1977, that such an offering was planned for mid-June of this year. (See Brief of plaintiff-appellant Fuqua, pp. 9-10). With respect to this proposed secondary offering, the proxy materials were also silent as to the fact that, were the proposed changes in goverance rejected by the Avis stockholders, it was the Trustee's intention not to go forward with the offering -- as revealed only during the proceedings in the Court below. (A 147-148)

Certain further information is provided with respect to the Trustee under the heading "Principal Stockholder", and with respect to both the Trustee and defendant-appellee O'Brien in proposing their election to Avis' Board of Directors. However, while revealing that both the Trustee and defendant-appellee O'Brien are partners in the law firm of Whitman & Ransom, (A 243- 244) the Proxy Statement does not reveal that the Trustee had received and was continuing to receive substantial compensation for his services as such, nor that substantial legal fees had been paid and were continuing to be paid to that law firm in its role as counsel to the Trustee. (A 130) Thus, the Proxy Statement did not reveal the potential interest of the Trustee, O'Brien and Whitman & Ransom, or the extent to which that interest might be affected by the acceptance or rejection of the Fuqua offer or the proposed changes in the manner of the governance of Avis and its Board of Directors.

B. The Supplemental Proxy Statement

While the Supplemental Proxy dated as of May 19, 1977, the record here is silent as to when, or even whether, it was effectively disseminated to the public shareholders of Avis. The record does show that the Supplemental Proxy was delivered to brokerage firms, who held Avis common stock as as nominees for beneficial owners thereof, on Monday, May 23, 1977 -- less than two full days before the scheduled Avis meeting. (PA 51; PA 30)

The Supplemental Proxy did set forth the terms of the Fuqua offer, the Trustee's rejection thereof, and the filing of the Registration Statement with respect to the proposed two million share secondary offering of Avis stock. In this connection, the Supplemental Proxy further states that:

> "...by a previous order of the Court, he [the Trustee] has been instructed to distribute the Avis common stock held by him through a series of public offerings continuing from time to time...; and that, unless otherwise advised by the Court, he intends to proceed..." (PA 48-49).

The Supplemental Proxy does not set forth that the previous order was and is subject to modification on application by inter alia, the Trustee (Cf. FA. 94 et seq.; FA 321); nor that that order (Trustee Order No. 3 dated January 14, 1976) had been made pursuant to the Trustee's own reports to the Court, recommending such a program of divestiture; nor that these recommendations were based upon such circumstances as the unavailability at that time of private offers for Avis' securities on favorable terms. (FA 322 et seq.)

These materials also did not disclose that the Trustee did not intend to proceed with the secondary offering unless the above described proposals were approved at the shareholders meeting.

Thus, neither the original Proxy Statement nor the Supplemental Proxy make any effort to explain and clarify

the relationship among the Fuqua offer, the Trustee's rejection thereof, the proposed secondary offering of Avis stock, and the proposals presented to the Avis stockholders. Moreover, while the Supplemental Proxy does set forth, for the first time, the amounts received as compensation by the Trustee and Whitman & Ransom, it still does not clarify or elucidate the relationship or potential relationship, between the Trustee's position on the proposals before the stockholders and his own role, or the role of his law firm, in the management and control of Avis and the continuation thereof. *

PRIOR PROCEEDINGS

Plaintiff Miller commenced this action on May 20, 1977, and on that day applied to the District Court for an Order to Show Cause, requesting a hearing as to why an order should not be made and entered:

(1) Enjoining defendant Trustee and defendant Avis from (i) voting any shares of Avis common stock at the forthcoming annual meeting of Avis stockholders, and (ii) soliciting any proxies with respect thereto.

(2) Enjoining Avis from holding the forthcoming annual meeting of its stockholders scheduled to take place on May 25, 1977 until the material misrepresentations and omissions in the proxy statement for said meeting were corrected.

(3) Granting the motion of plaintiff Miller to intervene in the action entitled United States of America v. International Telephone and Telegraph Corporation et ano, Civil Action No. 13,320.

(4) Enjoining defendant Trustee from commencing and effectuating a contemplated secondary offering and sale of two million shares of Avis stock.

(5) Granting such other and further relief as to the Court seemed just and proper.

The Court, after consulting by telephone with defendants' counsel and the Department of Justice, signed the Order to Show Cause but severly limited the original Order presented to the Court for signature. The Order to Show Cause was granted only upon Count I of plaintiff-appellant Miller's Complaint and not upon the allegations contained in the remainder of the Complaint which, inter alia, allege that the Trustee was breaching his fiduciary duty to plaintiff-appellant Miller and the public stockholders of Avis. Thus, by limiting the order in this manner, the plaintiff-appellant's was precluded from showing that the Trustee was violating his fiduciary duties to the public stockholders of Avis. In addition, the Court physically struck out paragraphs 3 and 4 of the plaintiff Miller's order to show cause (A 21-27), which foreclosed his right to argue that he and the other public stockholders of Avis should be entitled to intervene in the United States

action against International Telephone and Telegraph Corporation, i.e., the action in which the Trustee had received authority to commence the two-million-share offering of Avis stock.

The District Court on May 23, 1977, after argument, denied plaintiff Miller's motion for preliminary injunction. The Court found that the likelihood of success with respect to the allegations of proxy violations was "unclear and dubious" (A 170) and that the shareholders of Avis "[would] have the benefit of" (A 166) the Supplemental Proxy. With respect to the timeliness of the Supplemental Proxy, the Court found that the notice was "timely under the circumstances" (A166), and that "any delay was not the fault of the Trustee" (A 166). With respect to the question of irreparable injury, the Court recognized that the shareholders of Avis could contend that they were "deprived of the benefits of the Fuqua offer" (A 171), but found that any loss that had been sustained was "compensable by money damages" (A 172).

In deciding the timeliness of the Supplemental Proxy, the District Court in its denial of Fuqua's motion for a preliminary injunction placed great weight upon a defense raised by the defendants' laches. (A 162) No reference was made in the Court's decision, and, indeed, none could be made, as to laches with respect to the timeliness of plaintiff Miller's motion.

An immediate application was made to this Court by order to show cause, for this Court to (1) grant an order, pursuant to Rule 2 of the Federal Rules of Appellate Procedure, preferring and expediting this appeal from an Order of The Honorable M. Joseph Blumenfeld of the United States District Court for the District of Connecticut denying, inter alia, plaintiff-appellant's motion to enjoin defendant-respondent Avis from holding the forthcoming annual meeting of its stockholders scheduled to take place on May 25, 1977, and (2) grant an order, pursuant to Rule 8(a) of the Federal Rules of Appellate Procedure, enjoining Avis from holding the forthcoming annual meeting of its stockholders.

Argument was heard by this Court on May 24, 1977 on that application. This Court denied plaintiff-appellant's motion for a stay or other injunctive relief without prejudice to the merits of the appeals and granted plaintiff-appellant's motion for an expedited appeal.

ARGUMENT

POINT I

PRELIMINARY INJUNCTIVE RELIEF SHOULD HAVE BEEN GRANTED BECAUSE THE PROXY MATERIALS VIOLATE SECTION 14(a) OF THE EXCHANGE ACT AND RULE 14a-9; BY REASON OF SUCH VIOLATIONS, THE SHAREHOLDERS OF AVIS WILL BE IRREPARABLY HARMED.

A. The Proxy Material Contains Material Misrepresentations and Omissions in Violation of § 14(a) of the Exchange Act.

Rule 14a-9, promulgated under Section 14(a) of the Exchange Act, provides that no proxy solicitation shall be

made "which...is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading." The United States Supreme Court most recently defined the standard for materiality under Rule 14a-9 in T.S.C. Industries, Inc. v. Northway, Inc. 423 U.S. 820, 96 S. Ct. 2126, 2133 (1976), as follows:

> "[A]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. This standard is fully consistent with Mills general description of materiality as a requirement that 'the defect have a significnt propensity to affect the voting process.' It does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote. What the standard does contemplate is a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." (Emphasis in original.)

Accord, Sonesta International Hotels Corp. v. Wellington Associates, 483 F.2d 247 (2d Cir. 1973). See also, Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128 (1972); Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970); Broder v. Dane, 384 F. Supp. 1312 (S.D.N.Y. 1974).

In the instant action there were numerous omissions in the proxy material of facts which not only might have been

considered important by a reasonable shareholder in deciding how to vote, but which clearly would have been considered important.

There can be no dispute but that Proposals Nos. 1, 2 and 3, for which the Avis shareholders' votes were sought, were intended to effectuate substantial and significant changes in corporate governance, by amendment of Avis' by-laws and certificate of incorporation. As the Proxy Statement to a degree explained, although in broad generalizations, the proposals were designed to discourage, to render more difficult and to delay, any effort to obtain control of Avis' board of directors -- even by a majority stockholder or stockholders; and to deny to any majority of less than 80% the right to cause a merger, acquisition or similar transaction. Such provisions are commonly known as "anti-takeover", or minority veto provisions. Under the circumstances of this case, and quite apart from the question whether such provisions are generally desirable or undesirable, Avis' shareholders have been unfairly asked to approve them in vacuo, rather than with full knowledge of the relevant and material facts and circumstancaes prevailing at the time their votes were to be cast.

The Proxy Statement acknowledged that the Proposals "are intended, in general, to make more difficult and therefore discourage, attempts by others to acquire control of the company, through acquisitions of stock or otherwise, in transactions

not approved by the Company's Board of Directors." Significantly, it further stated that "[n]either the company nor the Trustee is aware of any pending or proposed transaction that would be affected by the proposed amendments." (emphasis supplied)

The Fuqua offer to purchase the Trustee's shares, and thereafter to make an offer for the shares held by the remaining public shareholders of Avis for at least an equivalent consideration, clearly rendered this statement misleading. Since Fuqua has stated that it would withdraw the offer if the Proposals were adopted, it is clear that this offer -- which the public stockholders of Avis and a disinterested Trustee might well deem advantageous -- would be so affected. The shareholders were entitled to have all of these matters fairly before them when they determined how to cast their votes. Many, we submit, might well have voted against the Proposals had they known that their adoption would cause the elimination of an opportunity to exchange their shares for consideration such as contemplated by the Fuqua offer.

Moreover, apart from the terms of the Fuqua offer itself, full knowledge of that offer and the surrounding circumstances, including the Trustee's rejection and the reasons therefore, would have given Avis' public shareholders a concrete context against which to judge the Proposals. They would have been able to fully comprehend the actual and potential opportunity cost to them of approving the Proposals, and to vote accordingly.

The Court below recognized to some extent the materiality of the Fuqua offer in relation to the proposals to be voted on, saying that it "might be necessary' to disclose the terms "of the Fuqua offering under Rule 14(a)-9". (A 162) However, the Court refused the relief sought despite its recognition of the inadequacy of the Proxy Statement in this regard. The stated bases for this refusal were the Court's own ad hoc judgment that it would not have required the Trustee to accept the Fuqua offer and that the Fuqua offer had been disclosed in the Supplemental Proxy. Both of these grounds, we respectfully submit, constitute error.

Whether the merit of the Fuqua offer was so clear that the Court would have ordered its acceptance has no bearing on the question whether the public stockholders were entitled to vote on the Proposals in the light of full disclosure of the Fuqua offer and the Trustee's reaction to it. Had all of these facts been before them, the shareholders would plainly have been able to see and understand the full effect of the "anti-takeover" proposals -- not only with respect to the Fuqua offer, but also with respect to any other future offer which might be more advantageous to them than the present plan of a continuing series of secondary public offerings of Avis stock. With respect to the Supplemental Proxy, as will be demonstrated below, the disclosure was both inadequate and untimely.

The Proxy Statement is also materialy defective in that it fails to disclose the registration of the proposed secondary offering of two million Avis shares held by the Trustee. The Proxy Statement merely states that "[t]he company has been advised by the Trustee that he currently intends to dispose of the remaining stock of the company held by him...by means of additional public offerings from time to time" (emphasis added). In view of the timing of the registration of the proposed secondary offering, in view of the plan existing since March, 1977 to make such an offering in June, 1977, and in view of the imminent sale by the Trustee of approximately one-half of his Avis stock, the mere statement that there is an intention to dispose of the stock by "public offerings from time to time" is certainly not an accurate description of the existing plans of Avis and the Trustee. It is difficult to imagine that at the time the Proxy Statement was issued, preparation of the Registration Statement, which was filed with the SEC less than two weeks later was not well along, or that the terms of the offering and the amount of shares to be offered were not already known to Avis and the Trustee.

The omission of any revelation of the imminent secondary offering is clearly material. It effectively conceals that adoption of the Proposals will permit the Trustee to maintain control of Avis despite his relinquishment of two million of his shares to the public, and that this is

the Trustee's intent and design. Thus, it appears that the Trustee is seeking to comply with the letter of the divestiture decree in United States v. ITT, supra, while maintaining control of Avis for as long as possible, along with the benefits of such control. Since the price of the secondary offering would be at or about the market price and will greatly increase the supply of Avis stock, while the per share value of the Fuqua offer would be substantially in excess of the market price; and since the Fuqua offer will not be made if the secondary offer goes forward, the Trustee's utilization of the secondary offering to comply colorably with the divestiture order while maintaining control is to the detriment of the Avis shreholders.*

In excusing the failure of the Proxy Statement to mention the secondary offering, the District Court noted that the Proxy Statement revealed that public offerings would be made from "time to time", that it was generally known that the Trustee's shares were to be divested by means of public offerings, and, therefore, that further details about the specific secondary offering contemplated by the Trustee need not have been revealed. However, the District Court overlooked or ignored the connection between the secondary offering and

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* It is also a violation of at least the spirit of the government decree which calls for divestiture as soon as possible of the Trustee's shares. The government takes no position with respect to the method employed, i.e., public or private sale (A 235).

the Proposals, and the fact that the secondary offering would eliminate the opportunity to take advantage of the Fuqua offer. A shareholder might well vote to reject the Proposals if he knew that the planned offering of two million shares went hand in hand with a plan to maintain control of Avis through the remaining 23% interest and that this particular public offering would defeat a more favorable private offering by Fuqua. The vague generalities offered by the Proxy Statement wholly fail to provide, once again, a concrete background against which to judge the proposals. The District Court's reference to "general knowledge" that the Trustee was to divest his Avis shares at sometime in the future through public sales does not come to grips with the issue, which was the adequacy or inadequacy of the proxy materials in the light of the circumstances existing at the time when Avis' shareholders were to vote. Moreover, such general information, even if conveyed by the proxy materials, was materially misleading in the absence of disclosure that Trustee Order No. 3 was framed at the instance of the Trustee, was based on the Trustee's report to the Court indicating, inter alia, the absence of any adequate private offers for Avis stock, and that said Order was at all times subject to modification in changed circumstances. The Fuqua offer, however, was a changed circumstance undercutting the basis for the public sale divestiture program. Since nothing in the Proxy Statement reveals the planned secondary offering,

the terms and conditions of Trustee Order No. 3, or the factors which gave rise to the Order, Avis' shareholders have been denied material information bearing upon their exercise of corporate suffrage.

Not only does the Proxy Statement fail to reveal the Trustee's plan to maintain control at the shareholders' expense but, by way of justification of the Proposals, it states that, because the present board consists "almost entirely of persons who are not officers or employees of the company, it is unlikely that the amendments would result in perpetuation of the company's present officers under circumstances detrimental to the stockholders...." However, the Proxy Statement does not reveal that the Trustee, as holder of 47% of the commmon stock of Avis, effectively controls the board of directors, that he will be maintained in control by adoption of the proposals, and, therefore, whether or not the present board itself has an interest in remaining in office is irrelevant. What is relevant is that the Trustee is seeking to maintain control, through adoption of the proposals, at the shareholders' expense.

The District Court minimized the effect of the mis statement by pointing out that the Proxy Statement "does reveal that the Trustee '...may be deemed to control the company within the meaning of the 1934 Act.'" (A 157) However, this true pro forma statement appears at the top of page 3 of the Proxy Statement, under the heading "Principal Stockholder." The statement that the Proposals are unlikely to result

in a perpetuation of the company's present officers under circumstances detrimental to the stockholders, appears at the bottom of page 7 under a different heading, "Items Nos. 2 & 3 -- Proposed Amendment to the Certificate of Incorporation and By-laws." Thus, a shareholder reading the Proxy Statement to learn of the effect of the proposals might well note, or associate the former statement with the assurances that the Proposals will not be detrimental to him because the directors are not employees or officers of the company. The absence of any emphasis on the Trustee's effective control, or any mention thereof or cross reference thereto in the discussion of the Proposals renders the latter discussion inadequate and misleading with respect to the full meaning of the assurances offered therein.

In addition, the Proxy Statement was misleading in that it stated therein that the effect of the proposals would be merely that they "could deter a change in the management or control of the company that would be advantageous to the company and its shareholders," and that "tender offers and other acquisitions of stock for the purpose of acquiring control of the board of directors could be discouraged." Of course, it is not just that possible acquisitions might be discouraged, but that the existing Fuqua offering will be withdrawn and any future offers would be deterred.

The Proxy Statement also does not disclose the financial interest that the Trustee and defendant O'Brien have in defeating the Fuqua offer and discouraging other acquisitions,

to wit: to preserve the continued payment of legal fees to their law firm as Avis' counsel. This omission alone constitutes a violation of the Act. See, e.g., Chris-Craft Industries, Inc. v. Piper Aircraft Corp., 480 F.2d 341, 365-66 (2d Cir. 1973), cert. denied, 414 U.S. 910 (1973). Accord, Mills v. Electric Auto-Lite Co. supra, 396 U.S. 375, 384 n. 6; Kohn v. American Metal Climax, Inc., 458 F.2d 255, 267 (3rd Cir. 1972), cert. denied, 409 U.S. 874 (1972).

The District Court acknowledged the importance of the Trustee's conflict of interest, the relevancy of such conflict to a shareholder decision, and even that an omission to set forth such conflict is material. However, the Court considered that the conflict had been disclosed in the Supplemental Proxy and that the amount of the legal fees paid the Trustee and his firm "are public, they have been approved by Justice, ITT and by me" (A 165) so that the conflict "is sufficiently disclosed... so as not to make that omission material." With respect to any information provided about the conflict in the Supplemental Proxy, as shown below, the update was completely ineffective to cure omissions previously made. The fact that the compensation received by the Trustee is on file with the court or is known by the Government and ITT does not constitute adequate disclosure for purpose of Avis' solicitation of proxies. The cases have often condemned the burying of material facts as inadequate disclosure under the proxy rules. Kohn v. American Metal Climax, Inc., supra

at 267-68; Norte & Co. v. Huffines, 304 F. Supp. 1096, 1106 (S.D.N.Y. 1968), modified 416 F.2d 1189 (2d Cir. 1969), cert. denied sub nom. Muscat v. Norte & Co., 397 U.S. 989 (1970). In Kohn, disclosure of data in an appendix to a lengthy document was condemned even though a cross reference to the appendix appeared in the body of the material. In the instant action, where the information is on file in the Court and perhaps in various private or confidential offices, and no reference whatsoever is made thereto in the Proxy Statement, a fortiori, disclosure thereof is inadequate. The fact that the information is on file in the court does not render it public for purposes of satisfying the disclosure requirements of the Federal proxy rules. Information becomes public only if it is "disseminated in a manner making it available to investors generally". Investors Management Co., Exchange Act Release No. 9267, at 10 (July 21, 1971). Accord, SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 848-49, 854 (2d Cir. 1968), cert. denied sub nom. Coates v. SEC, 394 U.S. 976 (1969). Thus, after acknowledging that the omission to reveal the Trustee's conflict was material, the District Court erred in its reasoning in not holding that such an omission was a violation of the proxy rules under the Exchange Act.

In view of the foregoing, all of the above described omissions, i.e. to set forth the Fuqua offer, the terms of the

offer, the Trustee's rejection thereof, the planned secondary offering, the relationship of the secondary offering to the proposals before the stockholders, the harm that adoption of the Proposals and the secondary offering would cause the public shareholders and the financial interest that the Trustee was trying to protect, rendered the Proxy Statement materially false and misleading in violation of § 14 of the Exchange Act. See e.g., General Time Corp. v. Talley Industries, Inc., 403 F.2d 159, 163 (2d Cir. 1968), cert. denied, 393 U.S. 1026 (1969); Gerstle v. Gamble-Skogmo, Inc., 478 F.2d 1281, 1297 n. 15 (2d Cir. 1973); Gould v. American Hawaiian SS. Co. 351 F. Supp. 853, 868 (D. Del. 1972).

B. The Supplement To The Proxy Statement

Defendants purported to update the Proxy Statement, so as to reveal the existence of the Fuqua offer and the registration of the secondary offering, by means of the Supplemental Proxy, dated May 19, 1977. The Court below relied heavily upon the Supplemental Proxy holding that it cured omissions from the Proxy Statement. However, as will be shown below, the Supplemental Proxy in itself contained omissions of material facts and did not cure the defects of the Proxy Statement. To the extent that it might have been curative of any defects in the Proxy Statement, the Supplemental Proxy, had no such effect, as it could not have been received by the Avis shareholders in sufficient time for them to consider the new information in connection with casting their votes.

While the Supplemental Proxy purports to furnish information updating the proxy statement, by revealing the fact of the Fuqua offer, the Trustee's rejection thereof and the filing of the Avis Registration Statement, it fails to cure the overall inadequacy of the proxy materials; and, with respect to certain matters, aggravates this inadequacy. The Supplemental Proxy does reveal that, on May 13, 1977 Avis filed a Registration Statement relating to the proposed sale by the Trustee of 2,000,000 shares of Avis stock. The Supplemental Proxy fails though, to reveal that as admitted by the attorney for the Trustee in open court, "any delay with respect to the acting upon the provision that will be before the me[illegible], on Wednesday and implementing those would probably cause the Trustee to be required to withdraw the Registration Statement now pending for the sale of two million shares." (A 147). No where in the Proxy Statement or in the Supplemental Proxy is there any reference to an interrelationship between the proposed two million share offering and the proposals before the shareholders. Certainly if the offering is contingent on the passage of the proposals, this must be considered a material fact which a voting Avis shareholder would consider before casting his proxy vote.

The Supplemental Proxy is affirmatively false and misleading in that it creates the impression that the Trustee's rejection of the Fuqua offer and his determination to continue to go forward with the secondary offering are

mandated by the irrevocable direction of the Court in United States v. ITT, supra. Once the defendants determined to inform the stockholders that divestiture of the Trustee's block of Avis common stock was proceeding pursuant to prior orders of the Court, and that the Trustee intended to continue in this course of action unless otherwise directed by the Court, we submit that further information was required to vitiate the misleading effect of that statement. The Supplemental Proxy should thus have informed the stockholders that the Order referred to -- Trustee's Order No.3 -- was subject to modification upon due application by the Trustee or any other interested party; and that said Order was promulgated only after the Trustee and his financial advisers had informed the Court that public distribution was the only effective way to achieve divestiture. The principal reason in seeking Order No. 3 was that such private offers as had been made for the Trustee's Avis shares had the involved inadequate consideration of $6 to $7 per share.

The Fuqua offer was in itself a significant change of circumstances; and, moreover, militated strongly for the proposition that, were the divestiture plan to be modified, other favorable private offers could be had. The failure to make all of the foregoing clear was, we submit, materially misleading to the Avis public shareholders.

Most of the misrepresentations and omissions contained in the Proxy Statement relate to facts of which the defendants

were well aware of prior to the issuance thereof. Thus, there was no need to withhold the information until the belated Supplemental Proxy was "issued" on May 19, 1977. (Although the Supplemental Proxy is dated May 19, 1977, the record shows that certain brokerage firms, who were holding Avis stock in "street name" for their customers, received the Supplemental Proxy "by hand", for distribution to their customers on May 23, 1977). Prior to the issuance of the Proxy Statement, the defendants must have been aware of the proposed secondary offering by the Trustee, and knew the interest that the Trustee and the defendant O'Brien had in discouraging offers to purchase the shares held by the Trustee; the control of Avis by the Trustee; and the effect that the Proposals will have in deterring any future acquisitions which might be favorable to the shareholders. Despite the defendants' previous knowledge of the foregoing, this information was withheld from the Avis public shareholders.

The Supplemental Proxy, dated May 19, 1977, may well have reached only registered owners of Avis shares prior to the meeting, and may not even have reached many of them. However, not only did the registered shareholders have no opportunity to act on the information contained in the Supplemental Proxy, short of attending the meeting in person to revoke their prior proxies, but the numerous Avis shareholders whose stock is held in street name undoubtedly did not even receive the Supplemental Proxy before the meeting. Thus, the Supplemental Proxy is a correction only in the most formalistic sense of

terms, and had no meaningful effect upon the shareholders' vote.

It is well-settled that a proxy statement should be updated where there is a material change of facts. See, e.g., General Time Corp. v. Talley Indus., Inc., 403 F.2d 159, 163 (2d Cir. 1968), cert. denied, 393 U.S. 1026 (1969). Accord, Gerstle v. Gamble-Skogmo, Inc., 478 F.2d 1281, 1297 n. 15 (2d Cir. 1973); Allen v. Penn Cent. Co., 350 Supp. 697, 705 (E.D. Pa. 1973); Gould v. American Hawaiian S.S. Co., 351 F. Supp. 853, 868 (D. Del. 1972). In relying upon the issuance of the foregoing Supplemental Proxy, the Court below overlooked the equally well-settled fact that correction of proxy or tender offer material can be considered effective only when stockholders have been given a reasonable time to evaluate the corrective material.

It is well established that correction of proxy material or a tender offer can be considered effective only if stockholders have been given a reasonable time to evaluate the corrected material. In Cauble v. White, 360 F. Supp, 1021, 1030 (E.D. La. 1973), the Court ordered that stockholders who had tendered shares pursuant to a misleading tender offer should be given seven (7) days to withdraw the shares subsequent to publication of a corrected offer. Therefore, in the instant action, the meeting should have been delayed for at least a sufficient period of time to give the shareholders seven (7) days from

the time they receive the Supplemental Proxy to evaluate the material therein and then revoke by mail any proxies they may previously have received, even if, as was not the case, those materials were a substantive cure of the violations here asserted .

In Sonesta International Hotels Corp. v. Wellington Associates, supra, the court, in requiring supplemental disclosure in a tender offer, required that the offeror "offer to those tendering shareholders who responded to its current offer an opportunity within a reasonable period of time to rescind their tender". Accord, Texas Gulf, Inc. v. Canada Development Corp. 366 F. Supp. 374, 379 (S.D. Tex. 1973).

In U.S. Smelting Refining & Mining Co. v. Clevite Corp., CCH Fed. Sec. L. Rep. ¶ 92,691, at 99,053, 99,054 (N.D. Ohio 1968), the court rejected the defendants contention that a failure to disclose in its proxy materials was cured by subsequent proxy materials because, inter alia:

> "...The shareholders will have at most nine days within which to evaluate [the new information], and, in the case of large numbers of shareholders holding shares in street name, far less or no opportunity to evaluate such materials...
>
> Even if the right to revoke was clearly stated and explained it seems clearly inappropriate for a court to allow the voting of proxies received from a defective solicitation."

In the instant action, as in U.S. Smelting Refining & Mining Co. v. Clevite Corp. supra the "large number of shareholders

holding shares in a street name [have] far less or no opportunity to evaluate such materials", and even the registered owners of the stock had insufficient time. In the Clevite case, an order was entered voiding all proxies received by way of solicitation undertaken by Clevite management and a new solicitation of proxies was ordered.

In view of the defendants failure to "correct" and update the proxy materials until the eve of election, and because there was insufficient time for the registered shareholders to act and no time for those who held in street name to act, the issuance of the Supplemental Proxy in no way cured the violative Proxy Statement.

The only view the court below expressed upon the timeliness of the Supplement was that "Fuqua's delay.. caused the problem. They were well aware, or should have been, for a long period of time ...that they were going to make this offer so that it is difficult for me to see how laches does not affect the ruling that the court ought to make with respect to [the Supplemental Proxy]."(A 162) Regardless of whether a defense exists against Fuqua by reason of laches, there is no such defense against the shareholders of Avis whom this plaintiff seeks to represent. This plaintiff acted immediately as he obtained information with respect to this matter, at all stages of this litigation, as he sought to obtain the

relief for the Avis shareholders. The Fuqua offer and the proposed secondary offering was announced in the newspapers on May 19, 1977 and that was the first time that the plaintiff and the class knew of their existence. The very next day, May 20, 1977, at 9:00 A.M., the plaintiff commenced the instant action and applied for the preliminary relief which is the subject of this appeal. On May 23, 1977, the District Court denied plaintiff's application and, on the very next day, May 24, 1977, in the morning, an application was made to this Court for a stay and an expedited appeal. Thus, laches has nothing to do with the plaintiff herein and the class he represents and can provide no defense in this action.

Accordingly, with respect to this action, the District Court erred in crediting the misleading and untimely Supplemental Proxy with correction of the flaws in the Proxy Statement.

C. Preliminary Injunctive Relief Was Warranted

A preliminary injunction should issue upon a clear showing of (1) probable success on the merits and possible irreparable injury, or (2) serious litigible issues on the merits and a balance of hardships tipping decidedly toward the party requesting the preliminary relief. See, e.g., Sonesta International Hotels Corp. v. Wellington Associates, supra. Apropos of the facts in the instant action, the Supreme Court noted in Mills v. Electric Auto Lite Co., 396 U.S. 375, 383 (1970), in dealing with a § 14(a) violation, "[u]se of a

solicitation that is materially misleading is itself a violation of law, as the Court of Appeals recognized in stating that injunctive relief would be available to remedy such defect if sought prior to the stockholders' meeting."

The probability of success on the merits in any application for injunctive relief based upon proxy violations turns greatly upon whether the plaintiff has shown that the proxy statement under attack has misstated or omitted material facts. Cf. Sonesta Int'l. Hotels Corp. v. Wellington Associates, supra. The materiality of facts allegedly misstated or omitted depends, in turn, upon whether a reasonable investor might have considered them to be important in deciding how to vote. It is respectfully submitted that Miller has established below a probability of success on the merits with respect to the issue of material non-disclosure and has, at the very least, raised serious litigable questions going to the merits of this case.

It is apparent that the class of Avis shareholders represented by the plantiff will suffer irreparable injury if the lower courts denial of the preliminary injunctive relief is allowed to stand. Not only will the shareholders lose the opportunity for the beneficial exchange to be made by Fuqua, but they will be far less likely to receive any other favorable offer for their stock in the future because of the entrenchment of the present management which would result

from adoption of the Proposals. In short, the shareholders will have been misled into acting for the personal self interest of the Trustee and for their own worst interests.

The Court below held that there would be no irreparable injury to the shareholders because (1) the results of the meeting could always be set aside by reason of a final determination in the action and Fuqua would then be free to make its offer, (2) it is unlikely that the Court would compel the Trustee to accept the Fuqua offer, and (3) only money damages were involved. We believe the Court's findings on this point are in error.

If the results of the meeting are set aside at the end of this litigation, which could last for years, there is no reason to believe that Fuqua will then be ready, willing and able to make the same offer. During such a protracted period of time, Fuqua's financial condition could change and Avis' financial condition could change. The opportunity exists now. There is no basis to assume that it will exist in several years from now. Thus, if immediate relief is not obtained the Fuqua offer will be lost.

The District Court's holding that there was no irreparable injury because it was not likely to direct the Trustee to accept the Fuqua offer also misses the point. The Court below erred when it considered whether or not in its opinion the Trustee should proceed with his present plans. The shareholders have the right to formulate an informed opinion based upon a fully

accurate and up-to-date proxy material and injunctive relief is an appropriate method of remedying the deficiencies in disclosure before the stockholders' meeting takes place. Cf. Sonesta Int'l. Hotels Corp. v. Wellington Associates, supra at 250. If the shareholders were informed by proper proxy material of the Trustee's rejection of the Fuqua offer and his plans for the secondary offering at a lower price, they could vote against the Proposals and, as the Trustee's counsel has stated in the proceedings below, the Trustee may well terminate his plans for the secondary offering. Under such circumstances the Trustee may well decide that he will accept the Fuqua offer, regardless of whether he is directed to accept it by the Court. Thus, regardless of the District Court's inclination with respect to the Fuqua offer, the misleading proxy materials have caused irreparable harm to the shareholders of Avis by preventing them from being in a position to obtain greater value for their shares than the present market price. The value is as of yet undetermined because, while Fuqua will offer $15.50 in value for the public shareholders' shares, according to Trustee's counsel in his comments made to this Court on May 24, 1977, if the Proposals in question are not passed, the door will be open to others to bid for Avis. If that does in fact occur, then value greater than not only the current market price, but also greater than the Fuqua offer (which exceeds current market price) may be offered to the public shareholders of Avis.

The District Court's holding that there was no irreparable injury because only money is involved overlooks the fact that the amount of money cannot presently be determined as well as damages to the shareholders of Avis, and the plans of the Trustee to entrench himself in control of the management of Avis will have the effect of deterring future acquisitions of Avis stock. All of this has a pronounced effect upon the business and operations of Avis in which the shareholders of Avis clearly have an interest. When a person's business or business interests are in jeopardy, equitable relief to defuse such jeopardy has always been appropriate.

It is also apparent that the balance of hardships virtually dictates granting of the preliminary relief sought. While the denial of the preliminary relief results in hardship to the shareholders described above, granting the relief would merely delay the defendants until it is determined whether or not their course of action is legal.

With respect to the requisite showing of merit of plaintiff's case, it is respectfully submitted that the material misstatements and omissions described above show a probability success on the merits so as to make preliminary relief appropriate. Sonesta Int'l. Hotels Corp. v. Wellington Associates, supra. However, even if it is assumed arguendo, that probable success on the merits has not been shown, it cannot be doubted that at least serious litigable questions

on the merits have been raised so that, together with the balance of hardship tipping in favor of granting relief, the relief is appropriate. Semmes Motors, Inc. v. Ford Motor Company, 429 F.2d 1197 (2d Cir. 1970).

With regard to the standard of review to be applied to the denial of Miller's motion for a preliminary injunction, the opinion of the District of Columbia Circuit in Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827 (D.C. Cir. 1972), should be noted. The Court in that case considered a motion for summary reversal of the grant of a preliminary injunction by the District Court. With regard to the standard of review, the Court stated:

> "However, a greater amplitude of judicial review is called for when the appeal presents a substantial issue that the action of the trial judge was based on a premise as to the pertinent rule of law that was erroneous. Not only the avowed forecast as to probability of success on the merits, but also the analysis of injury to either or both parties, the public interest, and the balancing of interests may well come to depend on an assumption of underlying legal premise. When this can be identified, the appellate court furthers the interest of justice by providing a ruling on the merits to the extent that the matter is ripe, though technically the case is only at the stage of application for preliminary injunction. And a reversal based on a disagreement with the underlying legal premise of the trial court is not based on, or to be construed as, a determination of arbitrary abuse of judicial discretion". Id. at 832 (footnotes omitted).

See also, Northeast Construction Co. v. Romney, 485 F.2d 752, 756 (D.C. Cir. 1973).

Applying these principles, it is submitted that the denial by the District Court of Miller's motion for a preliminary injunction was an error which this Court should correct.

POINT II

THE DISTRICT COURT ERRED IN NOT CONSIDERING ALL THE ALLEGATIONS CONTAINED IN PLAINTIFF'S COMPLAINT, AND BY NOT PERMITTING THE PLAINTIFF TO APPLY FOR LEAVE TO INTERVENE OR FOR A PRELIMINARY INJUNCTION RESTRAINING THE TRUSTEE FROM PROCEEDING WITH THE SECONDARY OFFERING OF TWO MILLION OF HIS AVIS SHARES. BY REASON OF SUCH ERROR, PLAINTIFF WAS PRECLUDED FROM A FULL CONSIDERATION OF ALL FACTORS RENDERING INJUNCTION OF THE MEETING AND OTHER INJUNCTIVE RELIEF APPROPRIATE.

It is well established that the jurisdiction of this Court on the instant appeal is plenary. 28 U.S.C. § 2106 provides:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

Professor Moore states regarding this section:

> "Once a timely appeal is taken from an order made appealable by statute, the power of a court of appeals should be plenary to the extent that it chooses to exercise it. A court should not close its eyes to what is plainly there. To read 28 U.S.C. ¶ 2106 in a technical way is to defeat its purpose.

> The spirit of the decision of the Second Circuit in Hurwitz v. Directors Guild of America, Inc. deserves wide diffusion. In Hurwitz, an appeal was taken from an order denying a preliminary injunction. Persuaded by its study of the record that the plaintiffs were entitled to judgment on the admitted facts as a matter of law, the court of appeals reversed with instructions to grant a permanent injunction. To be sure, the circumstances were unusual, but the decision stands for the larger, very salutary proposition that once a case is lawfully before a court of appeals, it does not lack power to do what plainly ought to be done." 9 Moore's Federal Practice ¶ 110,25[1], p. 273 (fn. omitted)

In the above quotation, Professor Moore, cited the decision of this Court in Hurwitz v. Directors Guild of America, Inc., 364 F.2d 67 (2d Cir. 1966) cert. denied, 385 U.S. 971 (1966) in which this court in an appeal from an order denying a preliminary injunction granted judgment for plaintiff in the form of a permanent injunction. This Court acted similarly in Noel v. Chapman, 508 F.2d 1023 (2d Cir. 1975). The Court stated:

> "Although technically the appeal here is from an order denying a preliminary injunction, the opinion of the court below finally determined the underlying legal and constitutional issues so that the case is ripe for plenary appeallate review. Sound judicial administration requires us to avoid subsequent unnecessary proceedings in the district court" 508 F.2d at 1024-1025.

In Mercury Motor Express, Inc. v. Brinke, 475 F.2d 1086, 1091 (5th Cir. 1973), the Fifth Circuit held that upon

appeal from an order denying a preliminary injunction, it possessed plenary power in the action and could thus review an otherwise unreviewable stay order:

> "Because this case is properly before the Court as an appeal from the denial of an injunction under 28 U.S.C.A ¶ 1292 (a)(1), however, our permissible scope of review extends to the stay order as well. A court of appeals normally will not consider the merits of a case before it on an interlocutory appeal except to the extent necessary to decide narrowly the matter which supplies appellate jurisdiction, e.g., Time, Inc. v. Ragano, 5th Cir. 1970, 427 F.2d 219, but this rule is one of orderly judicial administration and not a limit on jurisdictional power. "[O]nce a case is lawfully before a court of appeals, it does not lack power to do what plainly ought to be done.' 9 Moore's Federal Practice § 110.25 [1] (2d ed. 1972)...
>
> The Supreme Court has affirmed the power of an appellate court to reach the merits of a case before it on an interlocatory appeal and dismiss the action. Deckert v. Independence Shares Corporation, 1940, 311 U.S. 282, 61 S.Ct. 229, 85 L.Ed. 189; Smith v. Vulcan Iron Works, 1897, 165 U.S. 518, 17 S.Ct. 407, 41 L.Ed. 810. The Second Circuit has exercised its broad jurisdictional power on an interlocatory appeal from denial of a preliminary injunction to direct the entry of judgment for the plaintiffs. Hurwitz v. Directors Guild of America, Inc., 2d Cir. 1966, 364 F.2d 67, cert. denied, 385 U.S. 971, 87 S.Ct. 508, 17 L.Ed.2d 435. This Court has previously exercised its jurisdictional power to review an otherwise non appealable stay order in an interlocutory appeal from the denial of a preliminary injunction under § 1292(a)(1), and we think it is appropriate for the same purpose in this case..."

Accord, Mast, Foos & Co. v. Stover Manufacturing Co., 177 U.S. 495 (1900); Aerojet-General Corp. v. American Arbitration Association, 478 F.2d 248, 252 (9th Cir. 1973)

("This is an equity case, and it is well established that in such a case...an interlocatory appeal brings the entire case before the court"). See Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 994-995 (2d Cir. 1975), cert. denied, 423 U.S. 1018 (1975); Capital Temporaries, Inc. of Hartford v. Olsten Corp., 506 F.2d 658, 660 (2d Cir. 1974).

The relief the shareholders sought to obtain by intervention in the government action and the injunction of the Trustee's proposed secondary offering (and by necessary modification of Order number 3 in that action) are so intertwined with the request to enjoin the meeting of Avis shareholders that the District Court's limitation of the plaintiff's motion to the injunction of the meeting alone placed the plaintiff, and the Avis shareholders he seeks to represent, in a position of not being able to present all the issues affecting the public shareholders before the Court.

The shareholders of Avis sought to intervene in the government action in order to seek modification of the Court's divestiture order, (Order Number 3, FA 91), which authorized the Trustee to sell the Trust Property by means of periodic public sales, so as to permit the Trustee to accept the Fuqua offer or a better offer and enable the public shareholders to receive the benefit of an offer for their shares at a price above the market. Since plaintiff's arguments for enjoining the shareholders meeting rest to a certain

extent upon the existence of the Fuqua offer, it is clear that such a modification of the divesture order is an integral part of plaintiff's objectives. An application to intervene should have been permitted together with the application for an injunction of the Avis shareholder meeting, especially in light of the specific duty imposed on the Trustee by Order No. 3 to act in all circumstances in the best interest of the Avis shareholders.

The divestiture order restricting the sales of the Trust Property to public sales was made at a time when the only proposals for privately disposing of the stock were for a price of between $6 and $7 per share, i.e. far lower than the $15.50 per share offered by Fuqua, or were pursuant to a transaction which would have greatly diluted Avis' common stock to the detriment and loss of the minority shareholders. Since then, however, the Fuqua offer has been made to purchase the stock at a price in excess of the market value, a price necessarily more favorable than the public offerings contemplated by the court. It is for this reason, and to protect the opportunity of the Avis shareholders to reap the benefits of the subsequent exchange to be made by Fuqua for an equivalent consideration,* that the shareholders sought to modify the

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* According to defendant Shapiro, any delay in the annual meeting would have encouraged similar offers. (PA 43 This we submit would be of economic advantage to plaintiff and the public shareholders of Avis.

divesture order and bring the present opportunities to the District Court's attention in connection therewith.

Clearly, the public shareholders of Avis have an interest in the property or transaction which is the focal point in the government action Rule 24(a)(2) of F.R.C.P., Cascade Natural Gas Corporation v. El Paso Natural Gas Company, 386 U.S. 129 (1967). No one else in the government action has the same interest to protect. The government's primary interest is that the Trustee divest himself of the stock as quickly as possible, without necessarily having any concern that such be done in a manner which will inure to the best interests of Avis shareholders. Fuqua, which is also seeking to intervene, is interested only in being able to have its proposed offer implemented. It does not, however, share the concern of the Avis stockholders that any future acquisition opportunities would be prohibited as well. Indeed, it may have the effect of opening the door for competition offers which would necessarily benefit the public shareholders.

Thus, not only did the court preclude the shareholders from applying for an intervention which is essential for the preservation of their interests, but it also diminished the effectiveness of any relief obtainable by an injunction of the shareholders meeting. On the question of "interest" the Court in United States v. Reserve Mining Company, 56 F.R.D. 408, 412 (D.C.D. Minn. 1972) found that:

"The answers filed by the applicants indicate that they have various economic interests which are inextricably intertwined with the fate of Reserve Mining Company. To ilustrate, according to the answers filed by the applicants, there are approximately 11,000 people in northeastern Minnesota who are employed either directly by Reserve Mining Company or indirectly by various area businessess and industries supporting Reserve Mining Company. Many of these people live in the villages of Silver Bay, Babbitt, Beaver Bay, and the town of Beaver Bay, and thus in St. Louis and Lake Counties. The individuals employed by Reserve Mining Company and supporting businesses and the families of those individuals are dependent upon these businessess for their livelihood. The local agencies of government are dependent upon both the individuals and Reserve Mining Company and supporting businesses for tax revenues necessary to maintain the efficient operation of local government. The other businesses are also dependent for their continued operation, in part, upon the continued operation of Reserve Mining Company. The disposition of this litigation could, therefore, have a substantial impact on local agencies of government in the area, individuals in the area, and industry and business in the area."

In preventing the shareholders from applying for an injunction of the proposed secondary offering, the District Court precluded plaintiff from placing before the court an important issue which should have been before the court i.e., the Trustee's attempt to remain in control of Avis by preventing the acquisition of its shares by Fuqua, and any other potential buyer, which would be the effect when combined with the passage of Proposals 2 and 3 in the Proxy Statement. Instead, the

District Court permitted an application to be made only with respect to one component of the Trustee's scheme to maintain control, that is the proxy violation aspect of this litigation, and foreclosed any argument with respect to the allegations of the Trustee's breach of his fiduciary duty to the public shareholders of Avis. (A 169).

If the implementation of Proposals 2 and 3 are allowed to remain, the Trustee will retain control of Avis even though 2 million of his shares are distributed among the public. He will retain ownership of 22% of the outstanding shares which, with the passage of Proposal 3, is sufficient stock to block any merger of Avis with any other company. Thus, with the contemplated secondary offering, the Trustee argues that he is attempting to comply with the divestiture order, while in effect he is protecting his own self interests at the expense of the public shareholders and others.

The connection between the proposed secondary offering, and the meeting sought to be enjoined, is manifest by the fact that, in his papers submitted in the District Court, the Trustee stated that he would probably not proceed with the secondary offering if the meeting was enjoined or the proposals not adopted. Thus, the Trustee has made it plain that the abilty to maintain control which would be afforded by adoption of the proposals is a prerequisite to his compliance with the divestiture order by means of the secondary offering. In short, the Trustee will go through with the secondary offering

only if he can still maintain control of Avis by reason of the adoption of the proposals.

In light of the foregoing, we submit that the District Court erred in its refusal to even entertain an application to enjoin one of the vital elements of the Trustee's scheme -- by refusing to entertain an application to enjoin a form of divestiture that would cause great injury to the Avis shareholders (which is presently unascertainable because of the possibility of other future offers) by preventing them from accepting a far better offer from Fuqua or other offers which may be made.

CONCLUSION

For the reasons stated herein, this Court should vacate the judgment of the District Court, declare the Avis shareholder vote based on the Proxy Statement and Supplemental Proxy void, and enjoin the Trustee from commencing an effectuating the contemplated secondary offering and sale of the two million shares of Avis stock.

Respectfully submitted,

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